IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELALTE SIDE

FIRST APPEAL NO.1953 OF 2005

Prabhulal Misrimal Jain. ...Appellant.

Vs.

Municipal Corporation for Greater Mumbai & Anr. ...Respondents

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Ms. A. R. Pande for Appellant.
Mr. J. J. Xavier for the Respondents.

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CORAM : DR. D.Y. CHANDRACHUD, J.

December 15, 2005.

P.C.:

Admit. By consent of the parties taken up for hearing and final disposal. With the assistance of Counsel, the pleadings sand evidence have been perused.

The Plaintiff and his brother are tenants in respect of the Third and Fourth Floors of a building situated at 116, Kamathipura, Fifth Lane, Mumbai-400 008. According to the Plaintiff, he together with his brother acquired the tenancy in the year 1980. The Municipal Corporation issued a notice on 16th June 1994 under Section 351 of the Mumbai Municipal Corporation Act, 1888 in respect of the unauthorised construction of the Third and Fourth

Floors with ladi coba floor and G.I. Sheet roof. An opportunity was given to the Appellant to show cause. In his reply dated 27th June 1994, the Appellant stated that the Bombay Housing and Area Development Board had repaired the premises in March 1994 and that no part of the construction was unauthorised. The Appellant relied upon the assessment abstracts, Ration Card, a permission of the Repair Board, rent receipt and electric bill. The Deputy Municipal Commissioner, Zone-I, passed an order on 2nd September 1994 dealing with the documents which were furnished by the Appellant. The order notes that the assessment abstract dated 11th June 1994 showed that the third and attic floor was assessed in 1993-94. The permission of the Repair Board of 9th March 1994 did not, however, reflect the third and fourth floors. In the circumstances, the Deputy Municipal Commissioner came to the conclusion that the structure was not in existence prior to the datum line of 17th April 1964 and consequently the structure could not be tolerated.

The Appellant instituted a suit before the City Civil Court in order to complain of the action proposed by the Municipal Corporation of the demolition of the unauthorised portion

comprising of the third and fourth floors. The Learned Trial Judge noted that the reply of the Plaintiff dated 27th June 1994 which was annexed as Exh.H to the plaint contained a statement that the condition of the premises was dilapidated and that the Plaintiff had applied to the Repair Board for permission to carry out repairs. Permission was accordingly stated to have been granted by the Executive Engineer and the premises were repaired. Thus, in his reply to the notice, the Plaintiff had averred that he had carried out the repairs in the year 1993. Subsequently, however, the Plaintiff changed his stance and came out with the case that he had not carried out repairs in 1993. A copy of the reply which was produced by the Plaintiff and marked as Exh.13 in the evidence was of the same date, namely, 27th June 1994 but that was completely different from the reply dated 27th June 1994 of which a copy was annexed to the plaint. In these circumstances, the Learned Trial Judge was of the view that the Plaintiff had attempted to misguide the Court by producing the reply at Exh.13. Though the aforesaid reply is purported to have been dated 27th June 1994, it was submitted to the office of the Corporation on 7th December 1994. The conduct of the Plaintiff was, therefore, considered not to be fair by the Learned Trial Judge. The Learned

Trial Judge then noted that the landlord D. W. 2 had been served with the notice of the unauthorised construction by the Municipal Corporation but he had not replied to the notice. The landlord (PW2) was unable to produce the permission for the third and fourth floors. The Deputy Engineer of MHADA who deposed as P.W. 3 stated that the third and fourth floors were not in the sanctioned plan and MHADA had accordingly not carried out repairs to those floors. Exh.X-6 which is a copy of the plan of the Repair Board shows that the third and fourth floors were not in the sanctioned plan. The Trial Court held that the failure of the Plaintiff to produce the sanctioned plan or the City Survey record indicated that the construction was not authorised. There was no evidence to show that the structure was authorised or that it was in existence prior to the datum line. Though the Municipal Corporation had not filed a Written Statement, this in itself would not entitle the Plaintiff to a declaration since the burden was on him to establish his case. On a review of the evidence, the Trial Court came to the conclusion that the notice issued by the Municipal Corporation and the order passed by the Deputy Municipal Commissioner were not illegal.

On behalf of the Appellant it has been submitted that the Learned Trial Judge has relied upon the evidence of the Deputy Engineer of MHADA (P.W. 3) who deposed that the third and fourth floors of the building were not in the sanctioned plan of the Municipal Corporation. However, it was submitted that the witness admitted in the course of his cross-examination that he had not seen the plan of the Municipal Corporation. Reliance was also sought to be placed on an ad-interim order passed by a Learned Single Judge of this Court on 13th January 2005 in which it was observed that the original structure consisted of a Ground Floor and four upper floors and it was submitted that this observation was made after the records were produced by the Housing Board. Finally it was submitted that the assessment extract of the Municipal Corporation would show that the Appellant was entitled to a declaration as prayed.

The Appellant has challenged the legality and validity of the notice issued by the Municipal Corporation under Section 351 of the Mumbai Municipal Corporation Act, 1888 on 16th June 1994, furnishing an opportunity to the Appellant to respond to the allegation that the entire construction of the third and fourth floors

was unauthorised. In his reply dated 27th June 1994, the Appellant states that he had applied to carry out repairs to the premises and that upon permission being granted by the Executive Engineer, repairs were in fact, carried out. The Deputy Municipal Commissioner in his order dated 2nd September 1994 noted that the third and fourth floors were not reflected in the repair permission. The Appellant in the course of his Examination-in-Chief stated that he has not seen the sanctioned plan of the building or of the suit premises. He admitted that he had not furnished a copy of the sanctioned plan or City Survey record to the Municipal Corporation. The Appellant admitted that he had not made any correspondence with the landlord in regard to the authorisation of the premises. The landlord, P.W. 2, who stepped into the witness box stated that he had received notice from the Corporation in regard to the unauthorised construction. The landlord stated that he would try to produce the permission in respect of the construction of the third and fourth floors. However, that permission was never produced. On behalf of the Appellant, evidence was also adduced of Shri A. F. Wadhankar, who was serving as Deputy Engineer in MHADA. He was shown the repair plan in respect of the building which was repaired in the year 1993. The

witness specifically deposed that the building consisted of a Ground Floor and two floors and that consequently, repairs have been carried out by MHADA only upto the second floor. A copy of the plan was marked in evidence as Exh.X-6 and he stated that this was the plan which was utilised for carrying out the proposed repairs. In so far as the original sanctioned plan of the Municipal Corporation is concerned, he deposed that he had not seen the plan. P. W. 5 was from the Commercial Department of the BEST Undertaking and according to him, an electric meter was installed on the Third Floor only in the year 1980.

On this state of the evidence, what has emerged is that the premises came to be repaired by the Repair Board in the year 1993. The Learned Trial Judge has drawn an adverse inference against the conduct of the Appellant by annexing to the plaint a letter dated 27th June 1994 recording that he had sought permission to repair the premises and producing a letter of the same date in evidence taking quite a contrary position. Be that as it may, the Deputy Engineer of MHADA who deposed as a witness for the plaintiff would show that the building originally consisted only of a Ground and two floors and MHADA had in fact carried out

repairs only upto the Second floor in 1993. At the hearing of this appeal, reliance was placed by Counsel appearing on behalf of the Appellant on an ad-interim order of a Learned Single Judge of this Court dated 13th January 1995 in which it was observed that the original building consisted of a Ground and four floors. Now, observations in an ad-interim order cannot be regarded as a substitute for substantive evidence or proof at a trial. By its very nature, an ad-interim order is intended to operate until the interim application is taken up for hearing. Hence, it would plainly be impermissible to hold that an ad-interim order can be conclusive of the rights of the parties at trial. However, since the ad-interim order of the Court dated 13th January 1995 shows that the record was directed to be produced by the Housing Board through its Counsel, in order to satisfy the conscience of this Court in regard to the correct position of the matter, on the request of Counsel appearing on behalf of the Appellant, Counsel for MHADA was directed to produce the record in original in relation to the structure in question. Accordingly, Mr. K.K. Tated, Learned Advocate for MHADA appeared with the original record. In the records produced by MHADA the block plan in respect of the structure in question shows the existence of only a ground and two floors. On

26th August 1993, the Architect who was assigned with the task of preparing a repair proposal, noted this in a communication to MHADA wherein he stated that an estimate has, therefore, to be prepared only in respect of a ground and two floors. The proposal prepared by the Repair Board shows that two additional floors had been constructed unauthorisedly and the block plan did not tally with the repair plan. Hence, the Executive Engineer reported the matter to the Municipal authorities. The Executive Engineer accordingly issued a communication dated 26th October 1993 to the Ward Officer. Since the third and fourth floors were unauthorised, the Repair Board prepared a repair proposal for repairs only upto the second floor to the extent of an area of 160.78 sq.mtrs. The Municipal Corporation informed the Executive Engineer of the Repair Board on 24th June 1994 that the Corporation had initiated action under Section 351 of the Mumbai Municipal Corporation Act, 1888. The records of the Repair Board thus clearly show that the third and fourth floors are unauthorised. The Court must record that this exercise of summoning the record of MHADA was carried out at the request of Counsel appearing on behalf of the Appellant. This being a first appellate Court, it must decide the case in accordance with the evidence on record

which to my mind does not establish the authorisation of the third and fourth floors. The records produced by MHADA only reaffirm the view which emerges from the evidence.

For all these reasons, I am of the view that the Appellant has been unable to establish that the notice that has been issued by the Municipal Corporation under Section 351 of the Mumbai Municipal Corporation Act, 1888 and that the order of the Deputy Municipal Commissioner, suffer from any illegality. The failure of the Municipal Corporation to file a Written Statement would not displace the burden upon the Appellant of establishing his own case. The evidence that was adduced on behalf of the Appellant, including of the Deputy Engineer of MHADA, demonstrates that the structure on the third and fourth floors is not authorised.

In the circumstances, the appeal shall stand dismissed. Stay refused.

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